

**Consideration of recommendations for approval of new rules to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit issued by the Division of Water under IC 14-16-2, IC 14-28-1 or IC 14-29-1; Administrative Cause No. 13-088W**

The Division of Fish and Wildlife is proposing to add rules that would establish a new option for mitigation for permits from the DNR for Construction in a Floodway, Construction in or along the shoreline of a Public Freshwater Lake, and Construction in a Navigable Waterway. State law requires reviews of these permit applications for impacts to fish, wildlife, and botanical resources. Mitigation plans are often submitted that restore and establish habitat as the result of a project. Typically, mitigation is done on or near the project site, or at least within the watershed.

These new rules would allow for an applicant to submit payment to the Indiana Natural Resources Foundation as mitigation for impacts to fish, wildlife, and botanical resources. These funds would be used to establish or restore (or a combination thereof) habitat for fish and wildlife resources. This program is used in several other states already and is also used for mitigation for permits through the US Army Corps of Engineers. This option is especially important for INDOT and businesses that do large-scale projects around the state. Having small mitigation sites scattered throughout the state is not only expensive and labor-intensive, but it may also not result in the best benefit for fish and wildlife resources.

**TITLE 312 NATURAL RESOURCES COMISSION**

**Proposed Rule  
LSA # 13-  
DIGEST**

Adds 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit under IC 14-26-2, IC 14-28 or IC 14-29-1. Effective thirty days after filing with the Publisher.

312 IAC 9.5

SECTION 1. 312 IAC 9.5 IS ADDED TO READ AS FOLLOWS:

**Rule 1. Purpose and Administration**

**312 IAC 9.5-1-1 Purpose of in-lieu fees**

**Authority:** IC 14-10-2-4

**Affected:** IC 14-26-2; IC 14-28-1; IC 14-29-1

**Sec. 1. (a) This article establishes an option to request an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources if a permit is required under any of the following:**

- (1) IC 14-26-2 and 312 IAC 11.
  - (2) IC 14-28-1 and 312 IAC 10.
  - (3) IC 14-29-1 and 312 IAC 6.
- (b) Mitigation under subsection (a) is made through the payment of funds to:
- (1) establish;
  - (2) restore; or
  - (3) establish and restore;
- habitat for fish and wildlife resources. *(Natural Resources Commission; 312 IAC 9.5-1-1)*

### **312 IAC 9.5-1-2 Administration of in-lieu fees**

**Authority:** IC 14-10-2-4

**Affected:** IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 2. The department's division of fish and wildlife shall administer this article. *(Natural Resources Commission; 312 IAC 9.5-1-2)*

### **Rule 2. Definitions**

#### **312 IAC 9.5-2-1 Applicability**

**Authority:** IC 14-10-2-4

**Affected:** IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 1. (a) The definitions in this rule apply throughout this article.

(b) The definitions in 312 IAC 1 also apply. *(Natural Resources Commission; 312 IAC 9.5-2-1)*

#### **312 IAC 9.5-2-2 "In-lieu fee" defined**

**Authority:** IC 14-10-2-4; IC 14-28-1-5; IC 14-28-3-2

**Affected:** 14-26-2, IC 14-28-1, and IC 14-29-1

Sec. 2. "In-lieu fee" means a payment to the Indiana Natural Resources Foundation, to satisfy mitigation requirements under this article. *(Natural Resources Commission; 312 IAC 9.5-2-2)*

#### **312 IAC 9.5-2-3 "Mitigation" defined**

**Authority:** IC 14-10-2-4

**Affected:** 14-26-2, IC 14-28-1, and IC 14-29-1

Sec. 3. "Mitigation" means action to eliminate, lessen, or replace the loss of environmental benefits and ecological functions if those benefits and functions are disturbed by human activities. *(Natural Resources Commission; 312 IAC 9.5-2-3)*

#### **312 IAC 9.5-2-4 "Mitigation plan" defined**

**Authority:** IC 14-10-2-4; IC 14-28-1-5; IC 14-28-3-2

**Affected:** 14-26-2, IC 14-28-1, and IC 14-29-1

**Sec. 4. “Mitigation plan” means a document that provides mitigation through any of the following:**

- (1) The establishment, restoration, or a combination of the establishment and restoration of habitat for fish and wildlife resources.**
- (2) The use of an approved mitigation bank.**
- (3) Payment of an in-lieu fee. (*Natural Resources Commission; 312 IAC 9.5-2-4*)**

**Rule 3. Processing in-lieu fee mitigation requests**

**312 IAC 9.5-3-1 Permit applicant request for in-lieu fee**

**Authority: IC 14-10-2-4**

**Affected: IC 14-26-2, IC 14-28-1; IC 14-29-1**

**Sec. 1. (a) A person that applies for a permit under IC 14-26-2, IC 14-28-1, or IC 14-29-1 may propose to use in-lieu fee under this article.**

**(b) A person must submit the request on a departmental form.**

**(c) The request must be commensurate with the amount and type of impact that is associated with the permit and must include the following information:**

- (1) Steps taken to avoid and offset or minimize impacts at the project site.**
- (2) The reasons for a request to use an in-lieu fee compared to other mitigation.**
- (3) The proposed amount of the fee. (*Natural Resources Commission; 312 IAC 9.5-3-1*)**

**312 IAC 9.5-3-2 Department evaluation of in-lieu fee request**

**Authority: IC 14-10-2-4**

**Affected: IC 14-26-2, IC 14-28-1; IC 14-29-1**

**Sec. 2. (a) The department shall review a request for an in-lieu fee based on the following:**

- (1) The size and location of a project.**
- (2) Steps the permit applicant proposes to minimize or offset impacts to fish, wildlife, or botanical resources.**
- (3) Quality or uniqueness of habitat to be impacted.**
- (4) The level of impact to fish, wildlife, and botanical resources.**

**(b) The department may not approve in-lieu fee mitigation if:**

- (1) endangered, threatened, or rare species listed at 15 IR 1312 in the Roster of Indiana Animals and Plants that are Extirpated, Endangered, Threatened, or Rare exist at the project site.**
- (2) unique habitat communities will be affected.**

**(c) The department may recommend modifications to a request for an in-lieu fee. (*Natural Resources Commission; 312 IAC 9.5-3-2*)**

**312 IAC 9.5-3-3 Department action on in-lieu fee request**

**Authority: IC 14-10-2-4**

**Affected: IC 14-26-2, IC 14-28-1; IC 14-29-1**

**Sec. 3. The department may approve, approve with conditions, or deny a request for in-lieu fee mitigation based on the evaluation described in section 2 of this rule. (*Natural Resources Commission; 312 IAC 9.5-3-2*)**

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